

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 05-63

May 12, 2005

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Skip Counsel Issues and the Office of Appeals

Introduction

All parties and witnesses to Board proceedings are entitled to be represented by an individual of their choice. In OM 02-36, issued on February 15, 2002, the Agency set forth guidelines to ensure that Board field examiners and attorneys at the Agency's Regional Offices who investigate and try unfair labor practice cases comply with Professional Conduct Rule 4.2 when interviewing witnesses.¹ Skip counsel issues may also be implicated when a charging party appeals a Regional Director's refusal to issue an unfair labor practice complaint and the appeal raises evidentiary issues. This memorandum sets forth guidance for the Regional Offices to ensure that Board attorneys in the Office of Appeals do not inadvertently violate Rule 4.2's requirements.

Skip Counsel Issues and the Office of Appeals

Skip counsel issues may arise during the appeals process when a charging party challenges a Regional Director's determination that there was insufficient evidence to warrant complaint issuance and provides witness statements for consideration by the Office of Appeals. (See Unfair Labor Practice Casehandling Manual Sec. 10122.2). A charging party may contend, for example, that the Regional Director erred in failing to consider or accord proper weight to evidence proffered during the investigation or in failing to interview a particular witness produced by the charging party. However, the Region may have excluded such evidence based on a determination that the Board attorney or field examiner investigating the case was precluded under the ethics rules of the relevant jurisdiction(s) from interviewing the proffered witness ex parte, or from accepting an ex parte statement taken from a witness and submitted by the charging party.²

¹ Although the interpretation of ethics rules varies from jurisdiction to jurisdiction, ABA Model Rule 4.2 and state and federal ethics codes generally prohibit attorneys from "skipping counsel" by communicating directly with persons represented by an attorney without the consent of such attorney.

² In determining the relevant jurisdiction for purposes of a Rule 4.2 analysis, the Agency looks at the ethics rules of the licensing jurisdiction of the Board attorney conducting the investigation, or of the supervisory attorney if the investigation is being conducted by a field examiner. The Agency also examines the ethics rules of the situs of the contact and of any eventual trial. The Agency first determines which jurisdiction(s) would assert disciplinary authority over the contact and second, as a choice-of-law matter, which jurisdiction's ethics rules would apply.

Alternatively, a charging party may submit to appeals “new” evidence that was not proffered to or obtained by the Region. Such evidence may include ex parte statements taken from current or former supervisors/agents of represented parties that the Region would be precluded from considering under Rule 4.2.

To safeguard the Appeals process from accusations of ethics violations under either of these scenarios, it is necessary to (1) resolve the threshold issue of which ethics rules should govern the conduct of Agency Attorneys in the Office of Appeals, and (2) ensure adequate communication between the Regions and the Office of Appeals concerning potential skip counsel issues and prior ethics guidance from Special Litigation. These concerns are addressed below.

Board attorneys in the Office of Appeals should follow the ethics rules that governed the Region’s investigation of the case.

The Agency’s General Counsel has oversight responsibility over investigations conducted by the Regions. The General Counsel has delegated to the Office of Appeals the function of reviewing Regional Directors’ determinations that complaint issuance is not warranted.³ As part of that review process, the Office of Appeals, acting on behalf of the General Counsel, is responsible for ensuring in any given case that the Region has properly considered all relevant evidence. When an appeal raises evidentiary issues, the only evidence that is relevant to the appeal is evidence that ethically could be considered by the investigating Region. Accordingly, for purposes of an appeal, the relevant ethics rules to be followed by Board attorneys in the Office of Appeals are those that governed the Region’s investigation of the case. To apply ethics rules to Board attorneys in the Office of Appeals different from those that governed the investigation, would be to assign to the Office of Appeals an independent investigatory function, rather than the oversight and review function which they have been delegated by the General Counsel.

Indeed, the application of the same ethics requirements during the investigation and appeals processes is consistent with the ethical precepts set forth in the ABA’s Model Rule 5.1. Under that rule, a lawyer having managerial or supervisory authority over other attorneys has the responsibility of ensuring that such attorneys conform to their own Rules of Professional Conduct.⁴ The rule does not contemplate that the supervisor would impose his or her own rules on the process of supervisory review. Since the function of the Office of Appeals is to review, on behalf of the General Counsel, the Regional investigation and any attendant determination not to issue a complaint, the relevant rules for purposes of the review process would be those to which the field examiners and attorneys investigating the case had to conform. See Matter of Anonymous Member of the S.C. Bar, 552 S.E.2d 10, 14 (S.C. 2001).

³ As described in Sec. 202.1.3 of the National Labor Relations Board’s Rules & Regulations, the Office of Appeals “reviews appeals from Regional Directors’ refusals to issue complaints in unfair labor practice cases and recommends the action to be taken thereon by the General Counsel. Pursuant to request, the Director of the office may also hear informal oral presentations in Washington of argument by counsel or other representatives of the parties in support of, or in opposition to, the appeals.”

⁴ M.R. 5.1 is applicable to attorneys in government agencies. See Comment 1.

Implementation of the Agency's skip counsel policies in the Office of Appeals involves communication between the Regions and Appeals about potential skip counsel issues and about prior ethics guidance from Special Litigation.

In the case of an appeal, the Region's Comment on Appeal, which accompanies the submission of the case file to the Office of Appeals, should note any skip counsel issues that arose during the investigation of the case and how they were resolved, with reference to any ethics guidance given by Special Litigation and inclusion in the case file of that guidance. Also included in the Comment should be an indication of which jurisdiction or jurisdictions' ethics rules governed the investigation and a list of any witnesses the Region either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Litigation's guidance distributed agency-wide. Finally, the Comment should indicate if the Region was proffered a witness statement that it could not use in the investigation. Any copies of such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before transmission of the file to the Office of Appeals.

If the charging party proffers new evidence on appeal, and the witness is a former or current supervisor/agent of an organization represented by counsel, then the Office of Appeals can assess the appropriate course of action and, if necessary, consult with the Special Litigation Branch.

Any questions regarding this instruction should be directed to your Assistant General Counsel or Deputy.

/s/
R. A. S.

cc: NLRBU
Release to the Public

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